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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/599,344	09/26/2006	John L. Beiswenger	19310-907	7172
29450	7590	08/19/2009		
BARLEY SNYDER, LLC				
1000 WESTLAKES DRIVE, SUITE 275				
BERWYN, PA 19312				
EXAMINER				
SORIANO, BOBBY GILES				
ART UNIT		PAPER NUMBER		
3769				
NOTIFICATION DATE		DELIVERY MODE		
08/19/2009		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary

Application No.

10/599,344

Applicant(s)

BEISWENGER ET AL.

Examiner

Bobby Soriano

Art Unit

3769

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 September 2006.
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
4a) Of the above claim(s) 1-9 is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 10-12 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
10) ☒ The drawing(s) filed on 15 June 2008 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-8508)
Paper No(s)/Mail Date _____
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____

DETAILED ACTION

Election/Restrictions

Restriction is required under 35 U.S.C. 121 and 372.

This application contains the following inventions or groups of inventions which are not so linked as to form a single general inventive concept under PCT Rule 13.1. In accordance with 37 CFR 1.499, applicant is required, in reply to this action, to elect a single invention to which the claims must be restricted. The following distinct inventions are claimed:

Group I, claim(s) 1-4, drawn to a chart for graphing basal metabolic temperature.

Group II, claim(s) 5, drawn to a system for measuring basal metabolic temperature and waking peak flow.

Group III, claim(s) 6, drawn to a health agency report for monitoring infections using basal metabolic temperature and waking peak flow values.

Group IV, claim(s) 7-9, drawn to an apparatus for measuring basal metabolic temperature and waking peak flow.

Group V, claim(s) 10-12, drawn to an apparatus for measuring basal metabolic temperature, waking peak flow, plus one or more of heart rate, blood oxygen percentage and saliva acidity.

The inventions listed as Groups I-V do not relate to a single general inventive concept under PCT Rule 13.1 because, under PCT Rule 13.2, they lack the same or corresponding special technical features for the following reasons:

The singular element linking the groups together is a means for reporting predictive health monitoring data comprising basal metabolic temperature and waking peak flow. Because reporting predictive health monitoring data is well known in the art, as shown by Beiswenger et al. (WO/2003/071942) within at least the abstract and paragraphs [0030] - [0045], there is no special technical feature shared by the groups.

Applicant is advised that the reply to this requirement to be complete must include (i) an election of a species or invention to be examined even though the requirement may be traversed (37 CFR 1.143) and (ii) identification of the claims encompassing the elected invention.

The election of an invention or species may be made with or without traverse. To preserve a right to petition, the election must be made with traverse. If the reply does not distinctly and specifically point out supposed errors in the restriction requirement, the election shall be treated as an election without traverse.

Should applicant traverse on the ground that the invention or species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the inventions or species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

During a telephone conversation with Salvatore Anastasi on August 13, 2009 a provisional election was made with traverse to prosecute the invention of Group V, claims 10-12. Affirmation of this election must be made by applicant in replying to this Office action. Claims 1-9 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 10 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 10 recites the limitation "the rotating magnet within the impellor" in lines 5-6 of the claim. There is insufficient antecedent basis for this limitation in the claim.

Note to Applicant Regarding Claim Interpretation

The term "for" in the claims may be interpreted as intended use. Intended use/functional language does not require that reference specifically teach the intended use of the element. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 10-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mault et al.
US Patent Application 6,468,222 (hereinafter referred to as Mault '222) in view of Mault US
Patent Application 2002/0061495 (hereinafter referred to as Mault '495).

Mault '222 discloses the following of claim 10:

10. An apparatus *for* simultaneously measuring basal metabolic temperature, waking peak flow, plus one or more of heart rate, blood oxygen percentage and saliva acidity; the apparatus comprising:

a fluid channel *for* passing exhaled fluid and having an impellor disposed therein *for* measuring peak volumetric flow of fluid through the fluid channel by sensing the rotating magnet within the impellor with a field-effect transistor counting the numbers of rotation per second of the impellor (Fig. 4 flow tube 36 as described in column 6 line 65 to column 7 line 55; column 12 lines 36-44 teaches impellers as a fluid channel sensor);

a mouthpiece *for* insertion into an individual's mouth and forming a seal with the mouth and directing exhaled fluid into the fluid channel (Fig. 8 mouthpiece 20 or Fig. 21 mouthpiece 326);

a rapid thermometer probe with a metallic tip disposed in the mouthpiece *for* measuring basal metabolic temperature when the mouthpiece is inserted into the mouth (Fig. 3 temperature sensor 90 within the calorimeter as described in column 8 lines 15-45); and

a digital memory *for* storing measured values for basal metabolic temperature, waking peak flow, heart rate, blood oxygen percentage and saliva acidity (Ph) (Fig. 3 column 8 line 54 to column 9 line 17 indicating removable memory for storage of calculated or measured data).

Mault '222 does not disclose a second probe with a metallic tip disposed in the mouthpiece for measuring saliva acidity when the mouthpiece is inserted into the mouth. However Mault '495, a reference in an analogous art, discloses a system for respiration analysis (paragraph [0050]). Mault describes the use of a saliva pH sensor in paragraphs [0039], [0044], and [0048] as part of that respiration analysis.

Therefore it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the respiratory analyzer of Mault '222 in view of the saliva pH sensor in the respiratory analyzer of Mault '495, because Mault '495 teaches in paragraphs [0046] to [0048] that modifying the respiratory analyzer in Mault '222 (Ser. No. 09/630,398) provides the added benefit of detecting respiratory infections based on oral conditions.

Modified Mault '222 also discloses the following for claims 11 and 12 as cited in Mault '222:

11. The apparatus of claim 10 further comprising a connector *for* transmitting the measured values to a remote location (Fig. 3 communication connector 106 as described in column 8 line 54 to column 9 line 17 indicating wireless communications).
12. The apparatus of claim 10 further comprising a wireless means *for* transmitting the measured values to a remote location (Fig. 3 communication connector 106 as described in column 8 line 54 to column 9 line 17 indicating wireless communications).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Bobby Soriano whose telephone number is (571)270-7030. The examiner can normally be reached on Monday thru Friday, 9:30am to 6:30pm Alternate Fridays Off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Henry Johnson III can be reached on 571-272-4768. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/BGS/
Examiner, Art Unit 3769

/Michael C. Astorino/
Primary Examiner, Art Unit 3769

August 14, 2009